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Supreme Court, U.S.
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No. 01-995

IN THE

Supreme Court of the United States

THE UNIVERSITY OF MINNESOTA AND REGENTS OF THE UNIVERSITY OF MINNESOTA; WENDELL R. ANDERSON, *et al.*,

Petitioners,

v.

IAN MAITLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims against the Government*, 91 Nw. U. L. Rev. 899 (1997) 3

I. The Court of Appeals' Categorical Rule on Legislative Immunity is Inconsistent with This Court's Decisions.

Respondent's Brief in Opposition does not dispute that the court of appeals has ruled that members of the elected body governing the University of Minnesota are never entitled to the protection of legislative immunity, regardless of the nature of their collective action. That categorical ruling directly contradicts this Court's legislative immunity decisions, which, as pointed out in the Petition, hold that "[a]bsolute legislative immunity attaches to *all* actions taken 'in the sphere of legitimate legislative activity,'" *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (citation omitted) (emphasis added), and that "[w]hether an act is legislative turns on the nature of the act. . . ." *Id.* In nonetheless arguing against granting the Petition on this issue, Respondent makes two claims, neither of which is valid.

First, Respondent asserts that both the court of appeals' ruling below and its prior decision in *Stanley v. McGrath*, 719 F.2d 279 (8th Cir. 1983), were based on some fact-specific analysis of the actual functions and responsibilities of a particular entity and were not a categorical pronouncement covering a wide range of public governing bodies. This simply is not true. *Stanley* contains no record-based fact-finding on this question. *See* 719 F.2d at 284-85. Instead, it relies upon a prior Eighth Circuit decision, *Williams v. Anderson*, 562 F.2d 1081 (8th Cir. 1977), which had determined — also categorically — that local school boards are not protected by the doctrine of legislative immunity. *See* 562 F.2d at 1101 & n.33. Similarly, the ruling below on which review is now sought undertook no analysis of the functions or responsibilities of the Regents or of any

other public university governing board.[1] Indeed, the Eighth Circuit made no mention whatsoever of the Regents' Policies, *see* Pet. at 4-5, 10-11, which by themselves plainly contradict *Stanley*'s conclusory assertions. Instead, the court of appeals simply considered itself bound by its inter-panel uniformity rule, under which it followed *Stanley*. Pet. App. at 7a. Quoting *Stanley*, the Eighth Circuit left no doubt about its categorical position regarding legislative immunity for any acts of such a body:

> The governing body of a state-supported institution of higher learning, we think, cannot qualify for such protection.

Pet. App. at 6a. As shown in the Petition, this categorical holding directly conflicts with this Court's recent decisions. The Eighth Circuit's declaration that it does not ("We find, however, that *Bogan* fails to illuminate the issue here and does not require us to rethink our holding in *Stanley*." Pet. App. at 7a.) warrants review by this Court.

Second, Respondent attempts to deflect attention from this important issue by asserting that, in any event, settlements of claims against public institutions cannot be legislative in nature because they are not "uniquely" or "quintessentially" legislative acts. This argument is incorrect, both with regard to the facts of this case (as shown in the Petition at 15-18) and in general. The standard this Court

1. Indeed, neither the district court whose decision was on appeal to the Eighth Circuit in this case, *see* Pet. App. at 22a-23a, nor even the district court in *Stanley*, *see* 719 F.2d at 284 n.9 (noting district court did not reach this issue), has ever conducted a fact-based analysis of the functions or responsibilities of the Regents (or of any other public university governing body) to substantiate the court of appeals' categorical rule.

has established does not depend on uniqueness or quintessence; it depends on whether the action in question was taken "in a field where legislators traditionally have power to act." *Bogan*, 523 U.S. at 56 (citation omitted). Respondent would have this Court ignore well over two hundred years of American legal tradition. Beginning in the early 1700s, allowance or settlement of claims of individuals against governments in America was the exclusive prerogative of locally elected legislatures. James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims against the Government*, 91 NW. U. L. REV. 899, 929-37 (1997). This tradition was maintained for over 250 years, until waivers of sovereign immunity became common in the 1970s, and is still retained in whole or in part in many States. *See, e.g.*, Pet. at 18 n.21. Moreover, in addition to the settlement of the lawsuit here, there is no doubt that the substantial restructuring of faculty salary policies and the accompanying new budget priorities approved by the Regents — the real basis of Respondent's complaint — were traditionally legislative acts. Thus, contrary to Respondent's assertion, the actions taken by the public governing board in this case were "traditionally" legislative in nature, taken in a field within which it had power to act. *See* Pet. at 4-5, 10, 15-18.

II. This Court Should Review the Court of Appeals' Determination that Title VII Validly Abrogates the States' Eleventh Amendment Immunity with Regard to Sex Discrimination Claims.

Respondent does not deny that the question whether Title VII validly abrogates Eleventh Amendment immunity in the context of sex discrimination claims made against

States is an important one, and that the court of appeals did not perform the analysis now required by this Court to answer it. Instead, Respondent asserts that this Court decided that question in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), *see* Br. in Opp. at 9-10, obviating the need to address the merits here. That premise is incorrect. The court of appeals itself recognized that the issue presented here was actually an "ancillary antecedent proposition that was assumed, but not decided, by the Court [in *Fitzpatrick*]," Pet. App. at 8a, and concluded "we agree with the defendants that *Fitzpatrick* did not squarely decide the issue . . ." Pet. App. at 9a.

The court of appeals was correct in that conclusion. This Court did not grant certiorari in *Fitzpatrick* to determine whether a sex discrimination claim on behalf of men was within Congress' Section 5 powers, *see* 427 U.S. at 448 (restating issue on which certiorari was granted), and the opinion contains no analysis of that issue. Rather, the issue decided in *Fitzpatrick* was about "relief"— whether retroactive monetary relief is an available remedy against a State when Congress does validly exercise its Section 5 powers. *Id.* The Court did not address the validity of the exercise of that authority in the context of the case before it. Indeed, the Court expressly noted that the State had challenged only the remedy, and had not raised the issue of whether Congress has authority under Section 5 to abrogate sovereign immunity by authorizing sex discrimination suits against States by men.[2] It is well established that "[t]he Court

2. The Court's footnote states:

> Apart from their claim that the Eleventh Amendment bars enforcement of the remedy established by Title VII in this case, respondent state officials do not contend that

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often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions . . . and such assumptions . . . are not binding in future cases that directly raise the questions." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990).

Respondent also attempts to distract from the court of appeals' failure to apply the proper analysis by suggesting that it is "irrelevant" that remedies and defenses available under Title VII are not the same as those available for a constitutional claim because those remedies and defenses are not directly at issue in this case. But this Court's decisions teach otherwise. In *Kimel*, this Court struck down the ADEA under Eleventh Amendment analysis because, among other reasons, it permitted a BFOQ exception for age discrimination under certain circumstances and prohibited States from using age as a proxy for other characteristics. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86-88 (2000). Yet, those provisions were not at issue in the case. The employer did not argue for a BFOQ exception, and none of the plaintiffs argued that the State used age as a proxy for other characteristics. *See id.* at 69-72. Similarly, in *Garrett*, this Court struck down the ADA under Eleventh Amendment analysis because, among other reasons, it created disparate impact claims against States. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 372-73 (2001). This Court determined that such a standard would not even be

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(Cont'd)

> the substantive provisions of Title VII as applied here [i.e., on behalf of men] are not a proper exercise of congressional authority under § 5 of the Fourteenth Amendment.

427 U.S. at 456 n.11.

permissible under the Constitution in a race discrimination case, and found that the ADA was not congruent and proportional. *See id.* Yet, neither plaintiff had asserted a disparate impact claim. *See id.* at 362-63. Thus, it is clear that an Eleventh Amendment analysis properly takes into account any statutory provisions which Congress has made applicable to the States, whether or not directly implicated by the particular facts of the case at hand. *See also Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627, 647 (1999); *City of Boerne v. Flores*, 521 U.S. 535, 534-35 (1997). This is so because only an analysis of the totality of available claims, remedies, and defenses can determine whether a statute is congruent and proportional under the requirements of the Constitution.

Finally, Respondent asserts that the absence of any history of state-sponsored discrimination against men — which absence he admits — "is not determinative, or even of much help at all," Br. in Opp. at 11, because, "[a]lmost all established claims of sex discrimination will violate the Constitution," Br. in Opp. at 13. Even assuming he were otherwise correct, Respondent completely overlooks the fact that, regardless of the existence of a legally congruent "close fit," the absence of a demonstrated pattern of discrimination by the State limits the remedies Congress may impose in derogation of the Eleventh Amendment. This Court's clearest and most recent pronouncement on this precise point is set forth as part of the statement of the holding in *Garrett*:

> [I]n order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and

> the remedy imposed by Congress must be congruent and proportional to the targeted violation.

531 U.S. at 374. *See also id.* at 376 (Kennedy, J., concurring). Here, Respondent seeks to recover retroactive monetary relief from the State; whether *Garrett*'s requirement of a pattern of State discrimination applies to Title VII claims of men is an independently significant issue which warrants review, and is squarely presented.

In short, none of Respondent's arguments detract from the importance of the Eleventh Amendment question, or from the fact that it has not yet been decided by this Court. As the Petition has established, the Court should address this important question now.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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